

DOCKET FILE COPY 96-183

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

 In the Matter of)

Revision of Part 22 and)
 Part 90 of the Commission's)
 Rules to Facilitate Future)
 Development of Paging Systems)

Implementation of Section)
 309(j) of the Communications)
 Act -- Competitive Bidding)

WT Docket No. 96-18

PP Docket No. 93-253

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FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF SECRETARY

To: The Commission

MOTION FOR STAY

PageMart II, Inc. ("PageMart"), by its attorneys and pursuant to 47 C.F.R. §1.43, hereby submits this its Motion For Stay (" Motion") of the First Report and Order, WT Docket No. 96-18, PP Docket No. 93-253, FCC 96-183 (released April 23, 1996) ("First R&O"), in the above-captioned proceeding, pending PageMart's Petition for Reconsideration (" Petition") filed on June 5, 1996, seeking reconsideration of the First R&O. As demonstrated in this Motion, good cause exists for immediate Commission action to stay the interim rule provisions ("interim rules") adopted in the First R&O, pending Commission action on PageMart's Petition. The interim rules became effective upon publication of the First R&O in the Federal Register on May 10, 1996, 61 Fed. Reg. 21380. In support of this Motion, the following is respectfully shown.

I.

INTRODUCTION

1. PageMart filed Comments ("Interim Comments") with respect to the interim licensing proposal adopted by the Commission as part of the Notice Of Proposed Rulemaking in the above-captioned proceeding, FCC 96-52, released February 9, 1996 ("NPRM"), on March 1, 1996. On March 11, 1996, PageMart filed Reply Comments with respect to the Interim Licensing Proposal ("Interim Reply Comments"). On March 18, 1996, PageMart filed Comments ("Further Comments") in response to the remaining proposals specified in the NPRM.

2. PageMart is a medium-sized, innovative paging company that provides low-cost, nationwide services. PageMart holds both Part 22 common carrier paging ("CCP") and Part 90 private carrier paging ("PCP") licenses for paging services throughout the United States, including PCP licenses for which it qualifies for nationwide exclusivity. PageMart is now licensed and constructed on nationwide exclusive paging systems on the PCP Channels 929.6625 and 929.7125 MHz. Having never jeopardized any licenses by allowing them to expire, PageMart has completed construction on 929.7625 MHz and on May 17, 1996, PageMart, Inc. provided a list of 364 constructed sites on that frequency to David Furth, Chief of the Commercial Wireless Bureau.

II.

THE COMMISSION MUST GRANT THIS STAY

3. PageMart seeks a stay of the First R&O to ensure that PageMart's frequency 929.7625 MHz, as a nationwide exclusive PCP frequency, is not available for other applicants. It is PageMart's position that the First R&O erred in failing to extend exclusivity consideration to PageMart and other similarly situated parties for the purposes of the interim processing procedures outlined in the Commission's First R&O.

Exclusivity should have been extended to all entities that had completed as of February 8, 1996 exclusivity coordination with PCIA and, as a result of the PCIA coordination, had filed the requisite number of applications with the FCC to perfect the exclusivity claim as of that date. PageMart and other similarly situated entities should have then been identified on the PCP nationwide exclusivity frequency Public Notice, DA 96-748, released May 10, 1996. ^{1/}

4. The standard for a stay is well established. The Commission must balance the following four factors: (1) the likelihood that the moving party will prevail on the merits; (2) the prospect of irreparable injury to the moving party if relief is withheld; (3) the possibility of substantial harm to other parties if relief is granted; and (4) the public interest. Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977). As PageMart demonstrates below, consideration of each of these factors leads to the conclusion that the interim rules as adopted in the First R&O must be stayed.

A. PAGEMART IS LIKELY TO PREVAIL ON THE MERITS

5. As demonstrated in PageMart's Petition for Reconsideration, the Commission must act immediately to reconsider the First R&O to make clear that PageMart's frequency 929.7625 MHz qualifies as a nationwide exclusive PCP frequency that is exempt from the modified freeze because it will be excluded from geographic licensing. In particular, reconsideration is required for the following reasons:

- The failure by the Commission to include PageMart's frequency 929.7625 MHz as a nationwide exclusive PCP frequency that is exempt from the modified freeze and excluded from geographic licensing is in direct violation of the Commission's own

^{1/} Notwithstanding the Public Notice date of May 10, 1996, this document was not released to the Public until May 13, 1996.

rules and decisions and the previously-articulated Commission purpose for those rules.

- The Commission's failure to identify 929 7625 MHz as a nationwide exclusive PCP frequency exempt from the modified freeze and excluded from geographic licensing constituted a unilateral modification of the PageMart authorization for a coordinated nationwide frequency, which violated fundamental principles of due process and the overriding public interest in rapid licensing and deployment of nationwide paging systems.
- By failing to address PageMart's frequency 929.7625 MHz in the First R&Q, the Commission also impermissibly treated PageMart in a substantially different manner than other, similarly-situated licensees of nationwide exclusive CCP and PCP channels.

6. In the NPRM, at paragraph 26, the Commission asserts that all PCP channels for which licensees have met the construction requirements for nationwide exclusivity as of the date of the NPRM are excluded from geographic licensing. This announcement leaves PageMart in regulatory limbo.

7. It appears to be the Commission's position that it can change its rules without notice to those who may be harmed by the retroactive effect of such changes. However, courts have always looked for justifiable rationale for adoption of rules which resulted in harm to an applicant. See United States v. Storer Broadcasting Co., 351 U.S. 192, 193 (1956). See also, Hispanic Information and Telecommunications Network vs. FCC, 865 F.2d 1289, 1295 (D.C. Cir. 1989). In the present case, the Commission has not come forth with any sufficient rationale for it to change its rules retroactively. The Commission is merely saying that 929 MHz exclusivity, which it had only recently set in place, has now been eliminated. As the Court of Appeals in Mobile Communications Corporation of America, et al. v. FCC, No 93-1518 (D.C. Cir. March 8, 1996), pointed

out, the Commission must engage in reasoned decision-making. The Commission, according to the Court, must address such questions as to whether its new position is consistent with the reliance interests of those affected by its decision. In the present case, the Commission paid no heed to those licensees with pending requests who had met the requirements for nationwide exclusivity, who had been lulled into a false sense of security by the Commission's inaction and promises to release a second exclusivity list and further, who had invested substantial capital in the build-out.

8. In the present case, the Commission says nothing at all about the retroactive application of its proposed Rules. Yet by eliminating its Rules for exclusivity, it has applied its new standard to matters pending under the old rules. Landgraf vs. Film Products, 114 S.Ct. 1483, 1499 (1994) states that where a statute "would impair rights a party possessed when he acted, increase his liability for past conduct, or impose new duties with respect to transactions already completed," that is "genuinely retroactivity." 114 S.Ct. 1487. Here, the Commission cuts off the rights of an applicant with a pending request before the Commission, who had relied on the Commission to at least give it notice, and who now finds itself hopelessly cut off without so much as a grace period to salvage the time and resources it has committed to the project of nationwide exclusivity. PageMart submits that, under Landgraf, the proposed 929 MHz application processing must be classified as retroactive.

9. Further, in Bowen v. Georgetown University Hospital, 488 U.S. 204, 209 (1988), the Court stressed that "Retroactivity is not favored in the law" and stated that there must be *substantial justification* for retroactive rulemaking authority. Thus, it becomes a balancing test. See Retail, Wholesale, and Department Store Union v. NLRB, 466 F.2d 380, 389-390 (D.C. Cir. 1972) ("Retail Union") and Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551, 1554-55 (D.C. Cir. 1987), where the D.C. Circuit enumerated the considerations in the resolution of the dilemma of whether the inequity of retroactive application is counterbalanced by significant interest. These considerations are: a)

whether the case is one of first impression; b) whether the new rule represents an abrupt departure from well established practice or attempts to fill a void; c) the extent to which the party hurt by the new rule relied on the former rule; d) the degree of burden the retroactive order imposes; and e) the statutory interest in applying a new rule despite the reliance on the old standard. Retail Union . supra at 390. Here, a) the 929 MHz nationwide exclusivity is not a case of first impression; b) the processing procedures are a dramatic departure from existing procedures in that now, the applicant is out of luck, without any notice, that on February 8, 1996, its supposed nationwide exclusivity was lost; c) the applicants relied on the Commission to at least address the issues in its petitions or, in any event, to allow them the chance to complete nationwide build-out; d) a substantial burden rests on the unsuspecting applicants whose requests had been pending* for at least a year without a clue as to the disastrous fate the Commission was to impose; and e) there is no statutory interest in applying the new rules promulgated by the Commission, except that the Commission could gain money for the national treasury. However, auctions were never intended solely for the goal of raising money, at the expense of the public interest. In the latter regard, the Commission states only that effective February 8, 1996, those with pending matters in the exclusivity area are without rights.

10. In Landgraf, supra at 1497 the Court reiterates as it did in Bowen that the presumption is against statutory retroactivity which is founded upon "elementary consideration of fairness" dictating that "individuals should have an opportunity to know what the law is and to conform their conduct accordingly." The Court states in Landgraf that this presumption against statutory retroactivity is deeply rooted in the Supreme Court's jurisprudence and "finds expression in several constitutional provisions." See also Chemical Waste Management, Inc. vs. EPA, 869 F.2d 1526, 1536 (D.C. Cir. 1989).

11. Because the Commission does not -- and cannot -- state a sufficient underlying substantial purpose, a public interest rationale, for its new procedural rules, to balance the inequities to the applicants, it cannot impose them on pending requests.

12. A fundamental requirement of an administrative agency is to provide notice to those affected by its rules. Notice is an administrative *necessity* required by the Administrative Procedure Act ("APA"), 5 U.S.C. Section 552(a)(1)(B). A person affected by FCC actions must have actual and timely notice and no administrative action taken without such notice can be allowed to stand against a person who is adversely affected. See Northern California Power Agency v. Morton, 396 F. Supp. 1187, aff'd 539 F. 2d 243 (D.C. Cir. 1975). Where there has been reliance on an existing regulatory scheme, any change in the scheme must provide a reasonable opportunity for those caught in the change to conform. PageMart submits that to severely affect a licensee's rights without such notice, constitutes an impermissible taking. Because of these violations, PageMart is likely to prevail on the merits.

**B. PageMart Will Suffer Irreparable Harm From The
Commission's Imposition Of The Interim Rules**

13. On February 21, 1994, PageMart filed for 309 sites for a nationwide frequency with PCIA's predecessor NABER. Over the course of the next month, PageMart filed additional applications eventually totaling 429 sites. On March 15, 1994, PageMart requested nationwide exclusivity to accompany the previously filed applications which were received by PCIA. During the first week of May, 1994, PCIA coordinators began work on PageMart's applications and eventually determined that PageMart could be coordinated on 929.7625 MHz since there were only a handful of exclusive local systems already on the channel. PageMart's applications were then filed in May, 1994 with the FCC as coordinated on 929.7625 MHz.

14. On May 27, 1994, the FCC released Public Notice, DA 94-546 which listed those licensees who qualified for local, regional and nationwide exclusivity. In that Public Notice, the Commission stated that the list did not include pending requests or petitions for waivers of the exclusivity rules; however, the Commission did state that these would be addressed separately.

15. On PCIA's 929 Exclusivity Master List of December 1, 1994, PageMart was shown as having been coordinated for 929.7625 MHz. The Commission began granting licenses on that frequency to PageMart in December, 1994. In January, 1995, PageMart requested extended implementation for 929.7625 MHz and a waiver of Section 90.496(a-c) requiring the posting of a bond, on the basis that the it had shown its bona fideness by already constructing two nationwide systems, but that 929.7625 MHz required special analysis due to the fact that it was not exclusive through-out the whole nation. It further cited its pending request for exclusivity and a pending Petition to Dismiss 929 MHz Exclusivity Request as a basis for the totaling of construction deadlines. It also cited Commission precedent for the tolling construction deadlines of 929 MHz nationwide licenses. Despite that request, PageMart continued to construct its facilities, never jeopardizing any licenses by allowing them to expire, and on May 17, 1996, submitted to David L. Furth, Chief of the Commercial Wireless Division, an inventory of 364 constructed and operating facilities on the referenced frequency.

16. Even though the Commission in its First R&O, Note 8, stated that "our records indicate that Private Carrier licensees have met our requirements for nationwide exclusivity on 19 channels in the 929 MHz band," PageMart's claim to nationwide exclusivity on 929.7625 MHz was not listed on the Commission's PCP nationwide exclusive frequency Public Notice released May 13, 1996. Since PageMart's claims were not addressed in the First R&O, nor was its claim to exclusivity on 929.7625 MHz recognized in the PCP Nationwide Exclusivity Public Notice, it must be concluded that PageMart is not entitled to nationwide exclusivity on 929.7625 MHz. Accordingly,

PageMart, with respect to 929.7625 MHz, is subject to the modified freeze and the frequency will be subject to geographic licensing.

17. However, exclusivity should have been extended to PageMart and other similarly situated entities, and the First R&O and the exclusivity Public Notice should have made that designation clear. To have done otherwise prejudices PageMart who had relied upon the existing regulatory scheme to plan its business with respect to 929.7625 MHz to meet the ever increasing need for paging service.

18. Specially, as stated above, PageMart has constructed 364 sites and is operating the 929.7625 MHz nationwide system. PageMart provides unique paging services in that it offers nationwide, regional and local service. 929.7625 MHz is needed by PageMart due to subscriber demand in above-capacity situations relating to their initial two nationwide frequencies.

19. This makes it clear, therefore, that since the Commission had allowed the First R&O to become effective on the Effective Date without first including PageMart's nationwide exclusive frequency 929.7625 MHz as a nationwide exclusive PCP frequency exempt from the modified freeze and excluded from geographic licensing, PageMart will suffer irreparable damage by losing its vital ability to expand the PageMart nationwide system by constructing additional 929.7625 MHz transmitters throughout the country.

20. Further, extension of exclusivity for processing considerations under the interim rules to PageMart and this limited category of entities could not increase any potential for fraud. To the contrary, it is submitted that to do otherwise would provide opportunity for mischief by permitting unscrupulous promoters to file mutually exclusive applications in and around PageMart's core system on 929.7625 MHz. It also permits incumbent licenses who previously were prohibited from expanding to file additional applications to expand their networks at PageMart's expense. PageMart has already constructed 364 sites on this frequency in reliance upon its claim to exclusivity. Thus, PageMart has demonstrated its bona fideness in having made an investment based upon

its reliance on the Commission's exclusivity standards. Accordingly, the Commission must stay the First R & Q to ensure that PageMart has an opportunity to protect that investment without the possibility of "green mail", and to continue to build-out its system on 929.7625 MHz, pursuant to the protections extended under its claim of nationwide exclusivity to ensure competitive paging services to the public.

21. Because of PageMart's coordinated nationwide frequency and Section 90.495 of the Commission's Rules, prior to the First R&Q, the only entity that could apply for 929.7625 MHz in unserved areas was PageMart. PageMart could expand its coverage on this frequency into unserved areas without the filing of competing applications by any other applicant. If the First R&Q is allowed to stand, however, PCIA and the Commission would have to accept and process modified freeze applications, which could be filed by pre-adoption date licensees on 929.7625 MHz proposing extensions of existing systems as long as the 65-kilometer (40-mile) extension standard adopted in the modified freeze is met. Moreover, upon Public Notice of any such modified freeze applications, completely new entrants could file new post-freeze applications proposing 929.7625 MHz transmitting facilities that compete with the modified freeze applications.

22. These applications will allow entities other than PageMart to serve new, previously-unserved territory on 929.7625 MHz. Because of the coordinated PageMart nationwide frequency and Section 90.495 of the Commission's Rules, these applications could not have been filed with PCIA or the Commission prior to the adoption of the First R&Q.

23. For these reasons, PageMart respectfully submits that it will be irreparably injured if the Commission allows the First R&Q to stand without first granting PageMart's Petition and confirming that PageMart's frequency 929.7625 MHz is a nationwide exclusive PCP frequency that is exempt from the modified freeze and excluded from geographic licensing.

C. The Stay Will Not Harm Other Parties

24. Prior to the First R&O, no entities other than PageMart could have filed applications seeking authorization for 929.7625 MHz transmitting facilities that would have served unserved areas. Implementation of the interim rules adopted in the First R&O would, for the first time since PCIA coordination of the PageMart nationwide system application in June, 1994, allow members of the public to file applications (i.e., modified freeze applications and new post-freeze applications) that would allow service on 929.7625 MHz to previously-unserved territory. In view of the fact that these other parties did not have this ability prior to the First R&O, stay of the First R&O as requested by PageMart cannot be considered to harm these other parties.

D. The Public Interest Favors Stay

25. The public interest favors grant of this Motion and stay of the First R&O until the Commission grants PageMart's Petition and recognizes that PageMart's frequency 929.7625 MHz is a nationwide exclusive PCP frequency exempt from the modified freeze and excluded from geographic licensing. First, in the First R&O, the Commission itself recognized the need for rapid resolution of both the freeze and the modified freeze and the underlying issue of geographic licensing of CCP and PCP paging frequencies. Failure to stay the First R&O until the Commission can address the important issue raised in PageMart's and other affected entities' Petitions will subject the Commission's proposed geographic licensing scheme to litigation by those entities who have been denied nationwide exclusivity. Moreover, pending such judicial review, the Commission auction of geographic licenses for CCP and PCP channels would be subject to uncertainties that could greatly affect the manner in which such licenses are issued and the amounts that will be generated from such auctions.

26. In addition, the Commission has long held that the public interest is served by the establishment of CCP and PCP systems that serve a wider geographic area and fostering the development of nationwide paging systems. For example, in the R&O, 8 FCC Rcd at 8323 (1993) adopting exclusivity requirements for PCP channels the Commission stated that:

The purpose of nationwide exclusivity is not only to prevent interference with existing operations, but to provide an incentive for future expansion of coverage by nationwide licensees.

27. The maintenance of the status quo ante will have no adverse public interest impact. The Commission's impending new paging regulatory scheme can be implemented while at the same time recognizing the rights of those caught in the middle.

III.

CONCLUSION

28. For all of the foregoing reasons, PageMart respectfully requests that the Commission immediately stay the interim rules as adopted in the First R&O pending Commission action on PageMart's Petition. Stay is warranted under relevant, well-established standards and PageMart requests that the Commission act to grant the stay requested.

WHEREFORE, PageMart respectfully requests immediate stay of the interim rules adopted in the First R&Q.

Respectfully submitted,

PAGEMART II, INC.

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Dated: June 17, 1996

CERTIFICATE OF SERVICE

I, Gladys L. Nichols, do hereby certify that on this 17th day of June, 1996, the foregoing **MOTION TO STAY** was served to the following persons By Hand:

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